# INDEX

## CITATIONS

Cases:

Cases—Continued

Cases—Continued

Cases—Continued

Cases—Continued

Miscellaneous—Continued

# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

GISSEL PACKING COMPANY, INC., ET AL.

and

No. 691

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, PETITIONER

*v.*

GISSEL PACKING CO., INC.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

### OPINIONS BELOW

The opinions of the court of appeals (RI 316; RII 553; RIII 893) [1] are reported at 398 F. 2d 336 (*Gis-*

[1] The petition in No. 573 covers three decisions presenting the same legal issue. The record in the first, involving Gissel Packing Company, Inc., is designated "RI"; the record in the second, involving Heck's Inc., is designated "RII"; and the record in the third, involving General Steel Products, Inc., and Crown Flex of North Carolina, Inc., is designated "RIII."

*sel*), 337 (*Heck's*), and 339 (*General Steel*). The decisions and orders of the National Labor Relations Board are reported at 157 NRLB 1065 (*Gissel*), 166 NLRB Nos. 32 and 38 (*Heck's*), and 157 NLRB 636 (*General Steel*) (RI 314; RII 551; RIII 893).

## JURISDICTION

The judgments of the court of appeals were entered on June 28, 1968 (RI 319; RII 555; RIII 895). The petition for a writ of certiorari in No. 573 was filed on September 26, 1968, and in No. 691 on October 26, 1968.[2] Both petitions were granted on December 16, 1968 (RI 321). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Court of Appeals for the Fourth Circuit has erroneously construed Section 8(a)(5) of the National Labor Relations Act, which requires an employer to bargain collectively with the representative "designated or selected" by a majority of his employees, by its rule that, irrespective of his other unfair labor practices, an employer is justified in refusing to recognize a union that bases its claim to representative status solely on the possession of authorization cards signed by a majority of the employees.

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[2] On September 17, 1968, Mr. Justice Black extended the time for filing the petition in No. 691 to and including October 26, 1968.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151, *et. seq.*) are set forth in the Appendix, *infra,* pp. 59–61.

## STATEMENT

No. 573 covers three decisions of the Court of Appeals for the Fourth Circuit which present one legal issue in different factual contexts. We shall set forth the facts in one of the cases (*Gissel*) in somewhat greater detail than the other two (*Heck's* and *General Steel*).

### A. THE BOARD'S FINDINGS OF FACT

#### 1. GISSEL

In the summer of 1964, the Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL–CIO, began an organizing campaign at the Company's meat packing plant in Huntington, West Virginia. The Union was obliged to suspend its campaign for several months, however, because of its participation in Board unfair labor practice hearings concerning two other employers in the same town. As soon as Company Vice President Gissel became aware of the Union's activities at the other plants, he questioned employees Frye and Mount about their contacts with the Union, threatening to discharge them if he had any reason to suspect they had become involved (RI 265–266; 60–61, 93–94).

The Union resumed its campaign in January 1965; by January 22, it had obtained valid authorization

cards[3] from 31 of the 47 employees in the unit. On that day a union representative, Spencer, telephoned Gissel, told him the Union represented a majority of the employees, and requested recognition. Gissel referred Spencer to the Company attorneys. The same day, Spencer wrote Gissel confirming his telephonic request for recognition and offering to turn the signed authorization cards over to the Company "so that there will be no possible doubt as to our majority status." His letter also specified that "truck drivers" were included in the claimed unit (RI 255–257; 232).

In a reply dated January 26, Gissel rejected the Union's request for recognition because (1) the Union had lost an election held four years previously and the Company did not believe that there had been any change in employee sentiment since that time; (2) the Company had been advised of certain improprieties in the Union's organizing techniques, including instances of direct misrepresentation in obtaining authorization card signatures;[4] and (3) the Company did not know which employees were eligible voters,

[3] The wording of the card (RI 242) was as follows:

APPLICATION

FOOD STORE EMPLOYEES UNION, LOCAL #347

P.O. Box 2751, Charleston, W. Va.

The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours, and working conditions.

The card then provided spaces for the employee to sign his name and write his address, telephone number (sometimes omitted), the name and address of his employer, and the date.

[4] No evidence to substantiate this claim was introduced at the hearing (RI 264, 288).

and did not think that truck drivers were part of the unit.[5] The letter concluded by stating that, if the Union really believed it represented a majority, it would have petitioned the Board for an election (RI 257–258; 233–234). The Company did not seek an election.

On February 10, Spencer renewed the Union's request for recognition and again offered to deliver the signed cards to the Company. He explained that the Union had not sought an election because "[t]he coercion and intimidation and illegal interrogation and threats which occur between the time an election is petitioned and the actual election by the employees is most difficult for us to combat." He concluded by announcing the Union's intention of filing unfair labor practice charges against the Company for its refusal to recognize the Union. These were filed the next day (RI 258–259; 235–236).

Gissel answered on February 12, asserting that the Union's approach only bolstered the Company's opinion that it did not represent a majority of the employees. The Union responded on February 16, again urging the Company to check the signed authorization cards, and stating that the cards would be available for inspection at any time (RI 259–260).

During the five-week period in which he was corresponding with the Union, Gissel interrogated employees about union activity in the plant; sought information about the union activity of specific em-

[5] The Board found that Vice President Gissel in effect acknowledged at the Board hearing that he understood the Union was requesting the unit found appropriate in 1961 (RI 287, n. 39; 215–217).

ployees; threatened to close the plant if the Union came in; promised employees benefits; and warned that there was to be "no more of this Union stuff," that the Union would not get in, and that the Union would have to "fight [Gissel] first" (RI 265–270; 94–96, 102–104, 133–134, 140–141). After learning in April of a union meeting scheduled for later that month, Gissel let it be known that the Company would send a representative there to report which employees attended. He sent someone to the meeting who reported such information to the Company (RI 271–273; 64, 89–90). Two days after the meeting, Gissel forced Mount to admit that he attended the meeting, and then reduced both his and Frye's hours of work. Three days after this incident, Mount and Frye were discharged, to the accompaniment of derogatory remarks about the Union (RI 275–283; 65–68, 90–93).

2. HECK'S

By October 9, 1964, Chauffeurs, Teamsters & Helpers Local No. 175, after a brief organizational campaign, had obtained valid authorization cards from 13 employees out of a unit of 26 in the Company's Charleston area warehouses.[6] Believing that it had achieved majority status, the Union representative met that day with the Company and requested recognition. The Company president, when shown the cards,

[6] The card, in relevant part, stated (RII 512):

> Desiring to become a member of the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, I hereby make application for admission to membership. I hereby authorize you, your agents or representatives to act for me as collective bargaining agent on all matters pertaining to rates of pay, hours, or any other conditions of employment.

questioned one of the employees who had signed a card concerning his union membership, and thereafter responded "No Comment" to the Union representative's repeated requests for recognition. The Union obtained another authorization card the next day, giving it actual majority status; it immediately filed a petition for a representation election with the Board,[7] and two days later made another demand for recognition, which the Company refused (RII 426–428; 328–331, 333).

Meanwhile, the Company embarked on an extensive antiunion campaign. It coercively interrogated the employees about their union activities, offered them help in withdrawing from the Union, threatened them with reprisals if the Union's campaign were successful, offered and gave them better jobs for opposing the Union, and discharged the leading employee organizer (RII 428–433; 339, 365–366; 347–348, 352; 340–341).

The same pattern was repeated a year later in connection with the Company's Ashland, Kentucky store, where Food Store Employees Union, Local 347, Amalgamated Meat Cutters & Butchers Workmen of North America, AFL–CIO, obtained authorization cards from 21 of the 38 employees by October 5, 1965.[8] The next day the assistant store manager told an employee that he knew that the Union had acquired majority

[7] The election was not held because of the unfair labor practice charges which were subsequently filed.

[8] The card stated in relevant (RII 516):

> The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours and working conditions.

status. When the Union requested recognition on October 8, however, Company counsel questioned whether department heads were included in the unit. The Union representative replied that the Union represented a majority with or without the department heads and that he would leave it to the Company to determine whether to include them. By letter of October 11, the Union restated this position, and offered to submit the authorization cards to the Company for verification (RII 525–526, 538–539, 467–468, 473–474).

On October 13, Company counsel refused the request for recognition because of an alleged ambiguity in the definition of the unit, and because a "poll" taken by the Company showed that a majority of the store employees did not want union representation. The Union received no reply from the Company to another request for recognition, made on October 25 (RII 525–526, 513). Meanwhile, the Company told employees that an employee of another Company store had been "fired on the spot" for signing a card, warned employees that the Company knew which ones had signed cards, and polled employees about their desire for union representation without giving all of them assurances against reprisals (RII 526–533; 483, 499; 473–474, 490, 492).

### 3. GENERAL STEEL

The Upholsterers' International Union of North America, AFL–CIO, initiated an organizational campaign among the Company's employees in the early summer of 1964, and by August 13 had obtained authorization cards from 120 of the 207 employees in the

unit.[9] The Union wrote to the Company on that date requesting recognition, and the next day filed a representation petition with the Board. Company counsel responded to the Union's request on August 26, alleging doubt of the Union's majority status, and refusing to bargain "unless and until it is certified by proper authority" (RIII 573, 608).

Meanwhile, the Company began an extensive drive to undermine the Union's position in the plant. On several occasions, Company supervisors interrogated employees as to whether they had been solicited by the Union or signed a union card or whether they intended to vote for the Union in the impending election (RIII 565–567, 664–665, 681, 660–661, 683–684; 653–654). Further, employees were repeatedly warned that support for the Union, if discovered by the Company, would result in immediate discharge (RIII 565–567; 681–682; 683–684; 653–654). About midway through the union campaign, one of the supervisors, purporting to relay the words of Company President Hoffman, informed a group of four or five employees that, if the union did come in, "a nigger would be the head of it," and that, when the Company put on ten new machines, "the niggers would be the operators of them" (RIII 566; 626).

Shortly after this incident, the Company posted a large notice declaring its "firm belief" that a union victory would not benefit the employees but would

[9] The card, in relevant part, stated (RIII 621):

> I do hereby designate and authorize the Upholsterers' International Union of North America, AFL–CIO, and its representatives to act as my representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

"work to your serious harm" (RIII 569–570). A few weeks later, the nature of this "serious harm" was explained by a supervisor, who suggested to a group of employees that some of the Company's customers "wouldn't buy products on account of it was union made" and that "in case employees left * * * it might be hard for [them] to find a job because [they] had been working for a union outfit" (RIII 566–567; 643–644). Two days before the scheduled Board election, Vice President Hoffman detailed more of the dangers of unionization. He asserted that strikes were the Union's only weapon, but that, by virtue of North Carolina's right-to-work laws, strikes were of little value to the Union; for when employees "went out on strike, when [they] hit the door, [they] had no more job." Hoffman described the consequences of strikes at other plants where employees "lost their homes and their cars and everything they had," and concluded by declaring that while the "government said that [he] had to negotiate in good faith * * * he could negotiate and negotiate and negotiate, and he did not have to sign anything" (RIII 570–572; 639, 640–641, 642–643). The Union lost the election by a vote of 94–85 (RIII 563).[10]

### B. THE BOARD'S CONCLUSIONS AND ORDERS

In each of the above cases, the Board found (1) that the Union had obtained valid authorization cards from a majority of the employes in the bargaining

[10] The Union filed objections to the election, and the Board subsequently set it aside because of the Company's unfair labor practices (RIII 563, 591).

unit at the time of its demand for recognition,[11] and hence was entitled to represent the employees for collective bargaining purposes; and (2) that the Company's refusal to bargain was motivated not by a good faith doubt of the Union's majority status, but by a desire to gain time in which to dissipate that status (RI 286–291; RII 448–454, 534–545; RIII 568–591). It thus held that the refusals to bargain violated Section 8(a)(5) and (1) of the Act.

In each case the Board based its conclusion that the Company did not have a good faith doubt as to the Union's majority status on the fact that the Company had committed substantial unfair labor practices during its antiunion campaign. Thus, in *Gissel* it found that the Company coercively interrogated employees concerning their union activities, threatened them with discharge and other economic harm, and promised them benefits—all in violation of Section 8(a)(1) of the Act; and that the Company discriminatorily discharged Mount and Frye, in violation of Section 8(a)(3) and (1) (RI 283–286, 292–248). In *Heck's*, the Board found that the Company coercively interrogated employees, threatened reprisals against them for supporting the Union, created the impression

[11] In *Gissel*, the Board adhered to the unit determination which it had made when the Union filed a representation petition in 1961. In directing an election on that petition, the Board had found appropriate a unit of "all production and maintenance employees * * * including truck drivers, truck driver salesmen and the janitors (with the usual exceptions)." The Union lost the 1961 election (RI 254–256). In *Heck's*, the Board found that the Charleston Union had acquired majority status at least by the time of its second request for recognition (RII 451–452).

of surveillance of their union activities, and offered them benefits in exchange for opposition to the Union—all in violation of Section 8(a)(1); and that the Company discriminatorily discharged the leading union adherent, in violation of Section 8(a)(3) and (1) (RII 428–433, 526–533). In *General Steel*, the Board found that the Company interrogated employees and threatened them with reprisals, including discharge, in violation of Section 8(a)(1) (RIII 565–572). In neither *Gissel* nor *Heck's* was there any evidence tending to cast doubt on the validity of the Union's authorization cards.[12]

The Board ordered the Companies to cease and desist from the unfair labor practices found; to offer reinstatement and back pay to the employees who had been discriminatorily discharged; to bargain with the Union upon request; and to post appropriate notices (RI 300–303; RII 460–462, 546–548; RIII 592–594).

### C. THE DECISIONS OF THE COURT OF APPEALS

In each of the above cases, the court of appeals sustained the Board's findings that the Company had engaged in restraint and coercion in violation of Section 8(a)(1) of the Act, and, in *Gissel* and *Heck's*, the court also sustained the findings that the Company had discharged employees in violation of Section 8

[12] In *General Steel*, the trial examiner considered at length and rejected allegations of misrepresentation by the Union and misunderstanding by the employees of the purposes for which the cards were being solicited. The Board adopted his conclusions (RIII 577–588).

(a)(3) and (1) (RI 317; RII 554–555; RIII 894). In each case, however, the court refused to sustain the Board's finding that the Company's refusal to bargain violated Section 8(a)(5) and (1) (RI 317–318; RII 554–555; RIII 894). The court's reasoning, which was the same in all three cases, is illustrated by the following statement from its opinion in *Gissel* (RI 317–318):

> In recent cases we have had occasion to point out that authorization cards are such unreliable indicators of the desires of the employees that an employer confronted with a demand for recognition based solely upon them is justified in withholding recognition pending the result of a certification election.[3] The reasoning elaborated in those decisions applies with equal force here, and we decline enforcement of that portion of the Board's order requiring respondent to bargain with the union.

## SUMMARY OF ARGUMENT

In each of these cases, the Board found that the union involved had attained majority status through solicitation of authorization cards from the employees, and that, after the unions had attained this status and had requested the respective employers to recognize and bargain with them, the employers had engaged in extensive unfair labor practices which foreclosed the possibility of an immediate fair election and justified an inference that their refusal to bargain with

[3] *Crawford Mfg. Co.* v. *NLRB*, 4 Cir., 386 F. 2d 367, cert. denied, 36 LW3403 * * *; *NLRB* v. *S.S. Logan Packing Co.*, 4 Cir., 386 F. 2d 562; *NLRB* v. *Sehon Stevenson Co., Inc.*, 4 Cir., 386 F. 2d 551; *NLRB* v. *Heck's, Inc.*, 4 Cir., * * * (decided this day).

the unions was not prompted in good faith by a doubt of their majority status.

Under the Act, the duty to bargain with a union representing the majority of employees can arise without the necessity of a Board election. Although an employer who in good faith doubts whether a union seeking recognition has acquired majority status may wish an election to resolve his doubt, another employer's insistence upon an election—particularly if coupled with extensive unfair labor practices—may be undertaken for the purpose of dissipating the union's strength rather than testing it. Indeed, such unfair practices may have the actual effect of dissipating a present union majority and rendering a fair election impossible.

In the latter-type of case, the Board has often ordered employers to bargain with unions which previously attained majority status as shown by valid authorization cards. Repeated serious unfair practices are relevant, both to demonstrate the employer's improper motivation and to identify cases in which more than a simple cease and desist order is required to restore the previous situation. Particularly in view of an employer's ability repeatedly to frustrate Board elections by unfair conduct, the bargaining order is an appropriate and necessary remedy. Moreover, as the facts of these cases show, authorization cards are not so unreliable that a bargaining order based upon them is inherently suspect. If an employer's unfair practices have made an immediate, fair election im-

possible, such cards may in fact be the most suitable tool for measuring employee sentiment. And, contrary to the Fourth Circuit's view, the legislative history of the labor act makes plain that the bargaining order remedy has not been foreclosed. An amendment to that effect was specifically rejected by the Taft-Hartley Conference Committee. Nor is the possibility that the union may no longer command a majority of the employees controlling, if the Board determines that it has lost its majority as a direct result of the employer's unfair practices.

Finally, these cases are proper occasions for use of the bargaining order remedy. In *Gissel* and both *Heck's* cases the employers never sought to show the Board any reason to believe that their employees had not meant to authorize the unions involved to represent them for all purposes, as the cards concerned stated on their face; and the employers engaged in extensive unfair labor practices, including discriminatory discharges, in their attempt to combat the union. In *General Steel,* the employer repeatedly made flagrantly coercive statements and threats to his employees, justifying the Board's finding that he acted, not out of good faith doubt of the union's status, but in an effort to destroy the union. Although in this case the employer did attempt to show that the cards, although clear on their face, had been obtained under misrepresentations as to their purpose, the Board properly rejected his contention.

ARGUMENT

In language unchanged since the Wagner Act, Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." Section 9(a), also unchanged, provides that "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in an appropriate unit for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." There is a settled gloss upon the Act (see *infra*, pp. 20–21) that an employer confronted with a union demand to bargain may refuse if, in good faith, he doubts the union's majority status. In the present cases and others,[13] where a union's proof of representative status rested upon authorization cards signed by a majority of the employees rather than a Board election and certification under Section 9(c), the Fourth Circuit has ruled that an employer who refused to bargain must be deemed

[13] See also *National Labor Relations Board* v. *Logan Packing Co.*, 386 F. 2d 562 (C.A. 4); *National Labor Relations Board* v. *Sehon Stevenson & Co.*, 386 F. 2d 551 (C.A. 4); *Benson Veneer Co.* v. *National Labor Relations Board*, 398 F. 2d 998 (C.A. 4); *Breaker Confections, Inc.* v. *National Labor Relations Board*, No. 12,078 (C.A. 4), October 29, 1968, 69 LRRM 2559; *National Labor Relations Board* v. *Bratten Pontiac Corp.*, No. 12,356 (C.A. 4), January 15, 1969, 70 LRRM 2249.

to have had a good faith doubt as to the union's majority status if he claims such doubt, unless there is direct evidence to the contrary; the claim of doubt is not overcome by contemporaneous unfair labor practices, in violation of Section 8(a)(1) or other provisions of the Act, which the Board has found to be an effort to dissipate the union's strength. We show in Point I, *infra,* pp. 18–37, that under principles which the Board, this Court, and the courts of appeals have followed for over 30 years, an employer is obligated to bargain with a union which presents valid authorization cards signed by a majority of the employees absent a "good faith doubt" as to majority, and that the employer's other unfair labor practices are a relevant factor in determining whether he relied upon such a doubt in refusing to bargain. We further show, in Point II, *infra,* pp. 38–43, that, where the Board has found a refusal to bargain in violation of Section 8(a)(5), it may appropriately enter a bargaining order even though the union may subsequently have lost its majority status through the employer's unfair practices. Finally, we show, in Point III, *infra,* pp. 44–57, that, applying these principles here, the Board properly concluded that each employer violated Section 8(a)(5) by refusing to bargain with the union representing a majority of its employees, and thus its bargaining order should be enforced.

## I. An Employer Is Obligated To Bargain With a Union Which Presents Valid Authorization Cards Signed by a Majority of the Employees Absent a "Good Faith Doubt" as to Majority; the Employer's Other Unfair Labor Practices Are a Relevant Factor in Determining Whether He Relied Upon Such a Doubt in Refusing To Bargain

### A. Under Both the Wagner Act and the Present Act, a Union Is Not Limited to a Board Election and Certification as the Only Means To Establish Representative Status

Both Section 8(5) of the Wagner Act and Section 8(a)(5) of the present Act require an employer to bargain with the representative of his employees as defined in Section 9(a). In both, Section 9(a) refers to the representative as one "designated or selected" by a majority of the employees without specifying any particular method by which it is to be chosen.[14] Accordingly, early in the administration of the Wagner Act, it was recognized that a union need not have been certified as the winner of a Board election to invoke the Section 8(5) bargaining obligation; it could establish majority status and thus the bargaining obligation by other means, such as cards by which the employees authorized it to represent them for collective bargaining. See, *e.g.*, *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U.S. 318, 339–340; *National Labor Relations Board* v. *Reming-*

[14] Similarly, Section 7 of the Wagner Act, which in this respect also remains the same in the present Act, gives employees the right "to bargain collectively through representatives of their own choosing," but leaves open the manner of choosing such representatives.

*ton Rand, Inc.*, 94 F. 2d 862, 868 (C.A. 2), certiorari denied, 304 U.S. 576; *Lebanon Steel Foundry* v. *National Labor Relations Board*, 130 F. 2d 404, 407 (C.A. D.C.), certiorari denied, 317 U.S. 659. The existence of alternative routes to majority status, including authorization cards, has consistently been recognized under the present Act also by the courts of appeals [15] as well as this Court.

Thus, in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956)—a case decided nine years after the 1947 amendments—a union which had obtained signed authorization cards from a majority of the employees, but which had not filed certain data with the Secretary of Labor or non-Communist affidavits with the Board, as the Act then required, sought to obtain recognition by peaceful picketing. This Court held that the state court injunction of the picketing invaded the area preempted by the Act; although such non-filing would have precluded the union from being certified by the Board as the representative of the employees, that fact did not make the Act inapplicable. The Court pointed out that once the union filed the data and affidavits, "[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated Section 8(a)(5) of the Act" (p. 69); that nothing in the Act forbade a union which did

[15] See, *e.g.*, *National Labor Relations Board* v. *Whitelight Products Div.*, 298 F. 2d 12, 14–15 (C.A. 1), certiorari denied, 369 U.S. 887; *National Labor Relations Board* v. *Trimfit of California*, 211 F. 2d 206, 209 (C.A. 9); *National Labor Relations Board* v. *Elliott Williams Co.*, 345 F. 2d 460, 464 (C.A. 7); and cases cited n. 24, *infra*.

not file such data and affidavits from representing "an appropriate unit of employees if a majority of those employees give it authority to do so" (p. 71); that Section 9(a), "which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen" (*ibid.*); and that "[a] Board election is not the only method by which an employer may satisfy itself as to the union's majority status" (p. 72, n. 8).[16]

B. ALTHOUGH AN EMPLOYER ACTING IN GOOD FAITH IS ENTITLED TO INSIST UPON AN ELECTION, SUBSTANTIAL EMPLOYER UNFAIR LABOR PRACTICES MAY CAST DOUBT BOTH UPON HIS GOOD FAITH AND UPON THE POSSIBILITY OF A FAIR ELECTION, AND THUS JUSTIFY A REMEDIAL ORDER TO BARGAIN WITH A UNION WHICH HAS OBTAINED AUTHORIZATION CARDS FROM A MAJORITY OF EMPLOYEES.

It was established at an early date that an employer could refuse to bargain with a union if in good faith he doubted its majority status, and could require it to demonstrate through a Board election that it represented a majority of the employees in an ap-

[16] See also *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 101 (although Congress amended the Act in 1947 so that "Board certification could only be granted as the result of an election [see pp. 33–34, *infra*] * * * an employer would presumably still be under a duty to bargain with an uncertified union that had a clear majority, see *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8 (C.A. 1.)"); *Garment Workers' Union* v. *National Labor Relations Board and Bernhard Altmann Corp.*, 366 U.S. 731, 739 ("If an employer takes reasonable steps to verify union claims * * * he can readily ascertain their validity and obviate a Board election.").

propriate unit.[17] His refusal to bargain would not violate the Act, even if in fact the union did enjoy majority status.[18] In so interpreting the Act, the Board has recognized that determination of a union's majority status on the basis of cards frequently raises complex factual issues, that the election procedures of the Act provide a quick and dependable means of resolving those issues, and that the employer may commit an independent violation of the Act should he recognize a minority union (see *Garment Workers' Union* v. *National Labor Relations Board and Bernhard-Altmann Corp.*, 366 U.S. 731).

On the other hand, it was at the same time held that, if the employer was not acting in good faith, his refusal to bargain with a union which in fact represented a majority of the employees would be unlawful. See *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862 (C.A. 2), certiorari denied, 304 U.S. 576; *Chicago Apparatus Co.*, 12 NLRB 1002, enforced, 116 F. 2d 753 (C.A. 7); *National Labor Relations Board* v. *Clarksburg Publishing Co.*, 120 F. 2d 976, 980 (C.A. 4). "Whether in a particular case an employer is acting in good or bad

[17] See *Abinante & Nola Packing Co.*, 26 NLRB 1288, 1322–1323; *National Labor Relations Board* v. *Remington Rand, Inc.* 94 F. 2d 862, 868 (C.A. 2), certiorari denied, 304 U.S. 576.

[18] However, since the appropriateness of a bargaining unit is generally a pure legal issue, an employer's erroneous, though good faith, doubt as to the propriety of the unit in which recognition is sought will not ordinarily afford a defense to a refusal to bargain charge. See *National Labor Relations Board* v. *Bardahl Oil Co.*, 399 F. 2d 365, 368–370 (C.A. 8), and cases cited therein.

faith, is * * * a question which of necessity must be determined in the light of all the relevant facts in the case." *Artcraft Hosiery Co.*, 78 NLRB 333, 334. Unless his other conduct indicates a lack of doubt as to the union's majority,[19] an employer will not be deemed to have acted in bad faith because he insists on an election.[19a] Nor will bad faith be found in every case where he also commits other acts constituting unfair labor practices.[20] But where the refusal to bargain is accompanied by unfair labor practices, the Board has uniformly regarded those acts as having an important

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[19] See, *e.g.*, *Snow & Sons* v. *National Labor Relations Board*, 308 F. 2d 687 (C.A. 9); *Retail Clerks Union, Local No. 1179 v. National Labor Relations* (*John P. Serpa, Inc.*), 376 F. 2d 186 (C.A. 9). But cf. *Wilder Mfg. Co.*, 173 NLRB No. 30, 69 LRRM 1322.

[19a] See *Aaron Bros.*, 158 N.L.R.B. 1077, 1078; *H & W Construction Co.*, 161 N.L.R.B. 852, 857; *A. L. Gilbert Co.*, 110 N.L.R.B. 2067, 2069; *Roanoke Public Warehouse*, 72 N.L.R.B. 1281, 1282.

[20] For example, orders to bargain were not issued in the following cases despite refusals to bargain in the context of unfair practices: *Marlene Industries Corp.*, 171 NLRB No. 118, 70 LRRM 1089; *Orchard Corp.*, 170 NLRB No. 141, 67 LRRM 1586; *Hercules Packing Corp.*, 163 NLRB No. 35, 64 LRRM 1331, affirmed, 386 F. 2d 790 (C.A. 2); *Clermont's Inc.*, 154 NLRB 1397; *Caldwell Packaging Co.*, 125 NLRB 495; *The Walmac Co.*, 106 NLRB 1355; *Artcraft Hosiery Co.*, 78 NLRB 333; *Roanoke Public Warehouse*, 72 NLRB 1281.

The Board has emphasized that not "any employer conduct found violative of Section 8(a)(1) of the Act, regardless of its nature or gravity, will necessarily support a refusal-to-bargain finding." *Aaron Brothers*, 158 NLRB 1077, 1079. The Board considers the character of the unfair labor practices, "the sequence of events, and the time lapsed between the refusal and the unlawful conduct." *Ibid. See also Hammond & Irving, Inc.*, 154 NLRB 1071, 1073; *A.L. Gilbert Co.*, 110 NLRB 2067, 2071, and nn.

bearing on whether the refusal was prompted by a "good faith doubt."[21]

The employer's other unfair labor practices are relevant in two respects:

First, where an employer responds to a union's demand for recognition with such serious unfair labor practices that they dissipate the union's majority or are likely to have that effect, it is reasonable to infer, as the Board does, "that employer insistence on an election was not motivated by a good faith doubt of the union's majority, but rather by a rejection of the collective-bargaining principle or by a desire to gain time within which to undermine the union." *Aaron Brothers,* 158 NLRB 1077, 1079. Such unfair labor practices tend to show that any doubt which the employer might have had about the union's majority was not the basic motive for his refusal to bargain—that he refused to bargain because he had no intention of ever bargaining with the union however clear its majority might be, and desired to gain time to undermine it by unlawful means.[22] A refusal so motivated

[21] See. *e.g., Chicago Apparatus Co.*, 12 NLRB 1002, 1011–1012, enforced, 116 F. 2d 753 (C.A. 7); *Acme-Evans Co.*, 24 NLRB 71, 113–114, enforced, 130 F. 2d 477 (C.A. 7); *Joy Silk Mills, Inc.*, 85 NLRB 1263, 1264–1265, enforced, 185 F. 2d 732 (C.A. D.C.), certiorari denied, 341 U.S. 914; *Trimfit of California, Inc.*, 101 NLRB 706, 708, enforced, 211 F. 2d 206 (C.A. 9); *Pyne Moulding Corp.*, 110 NLRB 1700, 1707–1708, enforced, 226 F. 2d 818 (C.A. 2); *Economy Food Center, Inc.*, 142 NLRB 901, enforced, 333 F. 2d 468 (C.A. 7).

[22] As Judge Friendly pointed out in *National Labor Relations Board* v. *River Togs, Inc.*, 382 F. 2d 198, 206–207 (C.A. 2), such practices may also be designed to prevent a union from obtaining a majority which the employer doubts it pos-

violates the employer's bargaining obligation. See *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 868 (C.A. 2), certiorari denied, 304 U.S. 576; *National Labor Relations Board* v. *Clarksburg Publishing Co.*, 120 F. 2d 976, 980 (C.A. 4); *National Labor Relations Board* v. *Groh*, 329 F. 2d 265, 267–268, 269 (C.A. 10).

Second, wholly apart from their bearing on the employer's subjective motivation, unfair labor practices sufficient to dissipate a union's majority also preclude the Board from conducting a fair election. They thus undermine the very basis for the "good faith doubt" defense. The Board's election procedures normally provide a better means of testing majority status than a check of authorization cards. However, where the employer has precluded a fair election by his unfair labor practices, he has acted to defeat the premise on which the "good faith doubt" defense rests, and ought not to be permitted to assert any doubt he may have had. If in fact the union com-

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sesses when he acts. But aside from the question whether such doubts need be considered "good faith doubts," text *infra*, he has subsequently conceded that "the Board may properly insist not only that there be a reasonable basis for doubt but that this be a substantial reason for the employer's refusal to recognize the union rather than simply an excuse later manufactured for a position he would have taken in any event, and that his commission of unfair labor practices has some bearing on these issues, particularly the latter." *National Labor Relations Board* v. *United Mineral & Chemical Corp.*, 391 F. 2d 829, 838 (C.A. 2). His apparent concern is that the Board may have been relying on a *per se* rule, drawing the inference that good faith was lacking from *any* accompanying unfair labor practices. But as shown *supra*, n. 20, this has not been the case.

manded a majority when it made its demand, he may be ordered to bargain with it. As the Court of Appeals for the District of Columbia Circuit stated in *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 741, certiorari denied, 341 U.S. 914:

> The Act provides for election proceedings in order to provide a mechanism whereby an employer acting in good faith may secure a determination of whether or not the union does, in fact, have a majority * * *. Another purpose is to insure that the employees may freely register their individual choices concerning representation. Certainly it is not one of the purposes of the election procedure to supply the employer with a procedural device by which he may secure the time necessary to defeat efforts toward organization being made by a union * * *.

Accordingly, under both the Wagner Act [23] and the present Act,[24] the courts of appeals in every circuit,

[23] See, *e.g.*, *National Labor Relations Board* v. *Consolidated Machine Tool Corp.*, 163 F. 2d 376, 378–379 (C.A. 2), certiorari denied, 332 U.S. 824; *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. 2d 753, 756–757 (C.A. 7); *National Labor Relations Board* v. *Texas Mining & Smelting Co.*, 117 F. 2d 86, 88 (C.A. 5).

[24] See, *e.g.*, *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 741–742 (C.A. D.C.), certiorari denied, 341 U.S. 914; *International Union, United Automobile, A. & A. Imp. Wkrs.* v. *National Labor Relations Board*, 392 F. 2d 801, 808 (C.A. D.C.), certiorari denied *sub nom. Preston Products Co.* v. *National Labor Relations Board*, 392 U.S. 906; *National Labor Relations Board* v. *Sinclair Co.*, 397 F. 2d 157, 161 (C.A. 1), certiorari granted, December 16, 1968, No. 585, this Term; *National Labor Relations Board* v. *Quality Markets, Inc.*, 387 F. 2d 20, 25 (C.A. 3); *National Labor Relations Board* v. *Phil-*

including the Fourth Circuit prior to its recent departure,[25] have enforced Board orders to bargain where a union had obtained authorization cards from a majority of employees and the Board found that the employer's subsequent refusal to bargain was not prompted by a good faith doubt as to majority—as shown, at least in part, by contemporaneous employer unfair labor practices which tended to dissipate the union's majority and to preclude a fair Board election.

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*Modes, Inc.*, 396 F. 2d 131 (C.A. 5); *Atlas Engine Works, Inc.* v. *National Labor Relations Board*, 396 F. 2d 775, 775–776 (C.A. 6), petition for certiorari filed, No. 598, this Term; *National Labor Relations Board* v. *Clark Products, Inc.*, 385 F. 2d 396 (C.A. 7); *National Labor Relations Board* v. *Ralph Printing and Lithographing Co.*, 379 F. 2d 687, 693 (C.A. 8); *National Labor Relations Board* v. *Ozark Motor Lines*, 69 *LRRM* 2706 (C.A. 8); *National Labor Relations Board* v. *Luisi Truck Lines*, 384 F. 2d 842, 847 (C.A. 9); *Furr's, Inc.* v. *National Labor Relations Board*, 381 F. 2d 562, 567–568 (C.A. 10), certiorari denied, 389 U.S. 840.

The view of the Court of Appeals for the Second Circuit formerly fully comported with that of these other circuits. *E.g.*, *National Labor Relations Board* v. *Gotham Shoe Mfg. Co., Inc.*, 359 F. 2d 684, 686–687 (C.A. 2). However, recently the Second Circuit appears to have split in regard to the validity of the Board's reliance upon unfair labor practices as a basis for inferring bad faith. Compare *National Labor Relations Board* v. *Consolidated Rendering Co.*, 386 F. 2d 699, 704 (C.A. 2); *Bryant Chucking Grinder Co.* v. *National Labor Relations Board*, 389 F. 2d 565, 568 (C.A. 2), certiorari denied, 392 U.S. 908; *National Labor Relations Board* v. *Big Ben Dept. Stores, Inc.*, 396 F. 2d 78, 82–83 (C.A. 2), with *National Labor Relations Board* v. *River Togs, Inc.*, 382 F. 2d 198, 206–208 (C.A. 2); *National Labor Relations Board* v. *United Mineral and Chemical Corp.*, 391 F. 2d 829, 837–838 (C.A. 2). But see n. 22, *supra*.

[25] *Florence Printing Co.* v. *National Labor Relations Board*, 333 F. 2d 289 (C.A. 4); *National Labor Relations Board* v. *Overnite Transportation Co.*, 308 F. 2d 279 (C.A. 4).

C. The Considerations Relied on by the Court Below Do Not Warrant a Departure From These Principles

In departing from these well settled principles, the Fourth Circuit has held that "absent other affirmative evidence to show employer knowledge that its employees desire union representation,[26] an employer may properly have a good faith doubt as to the union's majority status and withhold recognition pending the result of a certification election." *National Labor Relations Board* v. *Bratten Pontiac Corp.*, No. 12,356, January 15, 1969, 70 LRRM 2249, 2252. Its position rests upon two premises: (1) that union authorization cards are inherently unreliable as an indication that the employees want the union to represent them; and (2) that Congress, in amending the Act in 1947, intended to make a Board election the only method for resolving questions about a union's majority status. See *National Labor Relations Board* v. *Logan Packing Co.*, 386 F. 2d 562, 568–570 (C.A. 4). Neither of these premises is valid.

1. Although there have been abuses in the use of authorization cards—primarily misrepresentations as to whether by signing the card the employees were designating the union as their representative or merely authorizing it to seek an election to determine that issue[27]—it does not follow that cards are so inherently unreliable that they may never be used to determine majority status. The Board views an election

[26] See *National Labor Relations Board* v. *Sehon Stevenson & Co.*, 386 F. 2d 551 (C.A. 4).

[27] See discussion at pp. 55–57, *infra*.

as ordinarily the most satisfactory and indeed the preferred, method of measuring employee sentiment.[28] But, if an employer has engaged in conduct tending to destroy the conditions necessary for a fair election, authorization cards may be the most effective method of assuring employee choice. If in a specific case union authorization cards have been misused, the proper remedy is to hold that the union did not represent a majority of the employees.[29] To give an employer's claim of doubt presumptive validity, as the Fourth Circuit does, is to enable employers to eliminate cards as a basis for representation in all cases, and is thus to permit them to delay or prevent unionization through interference with the election process.

Although the Fourth Circuit insists that coercion or misrepresentation in the solicitation of authorization cards is highly probable, there was not even an offer to prove such improprieties in three of the cam-

[28] "In fiscal year 1967 * * * the Board conducted 8,116 elections. Cases in which union majorities were determined by cards, apart from elections, numbered 157—about 1.9 percent of the number of elections conducted. Of the aforesaid 157 cases, all but 16 involved situations where a fair election was made impossible or was invalidated by employer unfair labor practices * * *." *Levi Strauss*, 172 NLRB No. 57, p. 6, n. 9, 68 LRRM 1338, 1342, n. 9. See also Supplemental Memorandum of the National Labor Relations Board to the Subcommittee on the Separation of Powers of the Committee on the Judiciary, United States Senate, 69 LRR 157, 164–165 (1968).

[29] See *e.g.*, *Englewood Lumber Co.*, 130 NLRB 394, 395; *Family Bargain Centers, Inc.*, 160 NLRB 816, 831–832; *Morris & Associates*, 138 NLRB 1160; *Tread Mills, Inc.*, 154 NLRB 143; *Dixie Cup, Div. of American Can Co.*, 157 NLRB 167; *Eagle-Picher Industries*, 171 NLRB No. 44, 64 LRRM 1570; *Romano Ford*, 171 NLRB No. 49, 69 LRRM 1292.

paigns involved herein (*Gissel, Heck's-Ashland,* and *Heck's-Charleston*), much less findings to that effect. Indeed, in *Heck's-Charleston,* the card signing was handled solely by the employees themselves, who contacted the union, obtained blank authorization cards, and solicited their fellow employees on that basis (R. II 426; 336–38, 350–351). When they returned the completed cards to the union agent, he expressly told them that he intended to use the cards to ask the Company for a contract. Only in *General Steel* did the Company challenge cards at the hearing on the basis of purported misrepresentations. But, after hearing testimony from over one hundred employee-signers, the Trial Examiner concluded that with a few nondeterminative exceptions "all of these employees not only intended, but were fully aware that they were designating the union as their representative" (RIII 582).

The court also asserted that the employees have no opportunity to hear the employer's counter argument when a bargaining agent is chosen on the basis of authorization cards. Again, the assertion is contradicted by the facts of these cases. In *General Steel,* the Company became aware of the Union's effort in June 1964, but did not receive a bargaining demand until August 13. In the interim, Company supervisors engaged in four separate incidents of coercive interrogation. In *Gissel,* the Union began its campaign in the summer of 1964, interrupted the organization effort for several months, resumed the campaign again in January 1965, and finally made a demand on January 22. The Company was well aware of these activities; in 1964, it had warned two employees—later discriminatorily

discharged—that involvement with the Union would lead to immediate termination. In *Heck's-Ashland* the first union card was solicited in February 1965, but no bargaining demand was made until October 8. By mid-May, the Company had delivered an anti-union speech to the assembled employees; shortly before the demand was made, the Company admitted knowing that the Union had a majority and the identity of the card signers. Compared to these, *Heck's-Charleston* was a quick campaign; the first demand for recognition was made only about a week after solicitation began. But at this time the Union did not represent a majority, and, before the Union was able to obtain the necessary cards and make a new demand, the Company president had delivered a speech informing the employees involved of his attitude toward the Union.

Finally, the court below contrasts the card check process with a secret ballot election, concluding that the lack of secrecy in the former creates an inherent unreliability. Specifically, the Court dwells upon the probable ill-effects of social pressure and group psychology when the choice of a bargaining representative takes place in public view. *National Labor Relations Board* v. *Logan Packing Co., supra,* 386 F. 2d at 566. But this argument assumes that employees who sign union authorization cards do so lightly and without any real intention of having the union represent them for collective bargaining purposes. In view of the substantial benefits of unionization (see *American Steel Foundries* v. *Tri-City Trades Council,* 257 U.S. 184, 209), there is no warrant for this assump-

tion. Moreover, social pressure exists in an election campaign, no less than in a card signing drive; if employees desire to sign cards only if their friends have, they will wish to vote as their friends do. The single moment of secrecy in the voting booth cannot totally eliminate all influences—from the employer, the union, and friends—that have been brought to bear during a campaign. And again, where the employer has warped the campaign by his unfair acts, the authorization cards may represent the most accurate view possible of employee sentiment.[30]

In sum, the Fourth Circuit has overstated the deficiencies of authorization cards; its rigid rule that authorization cards are *per se* unreliable certainly does not fit cases such as those here, where the supposed infirmities of cards are not in fact present and where the employer's unfair labor practices have effectively foreclosed the preferred election route.[31]

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[30] See generally Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851 (1967); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 46–53, 132–139 (1964); Comment, *Union Authorization Cards: A Reliable Basis For An NLRB Order To Bargain?*, 47 Texas L. Rev. 87 (1968).

[31] Contrary to that court's assertion, the Board has never stated that authorization cards are "inherently unreliable" in cases such as the present. Those words were used to describe authorization cards in *Sunbeam Corp.*, 99 NLRB 546, 550–551 (1952), but in a limited context not relevant here. The Board said that "authorization cards are a notoriously unreliable method of determining majority status *where competing unions are soliciting cards, because of the duplications which then oc-*

2. The 1947 amendments to the Act negate rather than support the Fourth Circuit's view. Although Congress amended the Act in many other respects, it made no changes in Sections 8(5) (apart from redesignating it 8(a)(5)) and 9(a). However, it considered and rejected a House bill which would have amended Section 8(5) so as to permit the Board to find a refusal to bargain violation only where an employer had failed to bargain with a union "currently recognized by the employer or certified as such under section 9."[32] As the House report reveals, this proposal was expressly intended to place recognition of an uncertified union wholly at the option of the employer.[33] Since certification could be obtained only

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*cur.*" (See *Levi Strauss*, *supra*, 172 NLRB No. 57, p. 7, n. 10, 68 LRRM at 1342, n. 10.)

The remarks of Board Chairman McCulloch in the American Bar Association's *1962 Proceedings: Section of Labor Relations Law*, 14, 17–18, do not support the court's views. He stated that a study of "good faith bargaining" conducted by Professor Philip Ross indicated a close correlation between the union's showing of interest and the election results. (The Board requires that a representation petition filed by a union be backed by cards or other evidence showing that the union has the support of at least 30 percent of the employees in the bargaining unit.) Thus, unions which presented authorization cards from 30 to 50 percent of the employees won 19 percent of the elections; those having authorization cards from 50 to 70 percent of the employees, won 52 percent of the elections; and those having authorization cards from 70 percent of the employees, won 74 percent of the elections. Chairman McCulloch concluded that "by and large the Ross study indicated that authorization cards do have validity." *Id.* 18.

[32] Section 8(a)(5) of H.R. 3020, 80th Cong., 1st Sess., 1 Leg. Hist. of the LMRA (1947) 51.

[33] H. Rep. No. 245, 80th Cong., 1st Sess. 30, 1 Leg. Hist. (1947) 321.

through an election, the employer's obligation to bargain on the basis of cards would have been totally eliminated. The proposal was rejected in Conference,[34] and it remains an unfair labor practice for an employer to refuse to bargain with representatives "designated or selected" by a majority of the employees. Congress thus may be said to have reaffirmed and retained the statutory basis for bargaining orders based on cards by a deliberate and explicit choice. As Senator Taft reported to the Senate (93 Cong. Rec. 6600, 2 Leg. Hist. (1947) 1539):

> the Senate conference refused to yield to the House with respect to the provisions contained in the House bill amending the provisions in * * * subsection 8(5) relating to collective bargaining. This means that the five unfair labor practices contained in the present NLRA remain unchanged except for [a presently immaterial difference].

The Fourth Circuit nonetheless concluded that Congress accomplished precisely the change which it expressly rejected in regard to Section 8(5) by amendments to *other* sections of the Act. RII 554; *National Labor Relations Board* v. *Logan Packing Co.*, 386 F. 2d 562, 569 (C.A. 4). The court relied primarily on the amendment of Section 9(c), which prescribes the process by which a union may obtain a Board certification, to eliminate the phrase "any other suitable

[34] H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41, 1 Leg. Hist. (1947) 545.

method to ascertain such representatives."[35] But although this amendment makes election the sole basis for certification,[36] it is not inconsistent with a continued duty under Section 8(a)(5) to bargain with a union whose majority status is established by some other means, such as cards. Certification carries with it special privileges not accorded unions which have been recognized voluntarily or pursuant to a bargaining order: *e.g.*, protection for 12 months against the filing of new election petitions, either by rival unions or by employees seeking decertification (Section 9(c)(3)); protection for a reasonable period, usually one year, against any disruption of the bargaining relationship based upon claims that the union has lost its majority status;[37] protection against recognitional

[35] Section 9(c) of the Wagner Act provided:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify * * * the name or names of the representatives that have been designated or selected. In any such investigation, the Board * * * may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

[36] Under the Wagner Act, the Board had occasionally used authorization cards as a basis for certification. However, this practice was largely abandoned by 1939, when the Board concluded that the policies of the Act would be best served if contested certification issues were decided by secret ballot election. See *Cudahy Packing Co.*, 13 NLRB 526; *General Box Co.*, 82 NLRB 678, 683. The Board continued to rely upon cards for certification purposes when the parties consented to a card check procedure. See S. Min. Rep. No. 105, 80th Cong., 1st Sess. 34, 1 Leg. Hist. (1947) 496.

[37] This decisional "one year rule" has application wholly apart from the statutory ban on elections within 12 months of a certification (Section 9(c)(3)). See *Brooks* v. *National Labor Relations Board*, 348 U.S. 96.

picketing by rival unions (Section 8(b)(4)(C)); and freedom from the restrictions placed on work assignment disputes by Section 8(b)(4)(D), and on recognitional and organizational picketing by Section 8(b)(7). See *General Box Co.*, 82 NLRB 678, 682. In short, in restricting the certification process to an election while expressly leaving the Section 8(a)(5) bargaining obligation unchanged, Congress indicated only that the special benefits flowing from a Board certification should be reserved for unions whose status had been tested in a secret ballot election.

The Fourth Circuit also relied upon the addition of subparagraph (B) to Section 9(c), permitting an employer to petition for an election whenever one or more unions present demands for recognition.[38] But the legislative history of this amendment indicates only that Congress enacted subparagraph (B) for the purpose of affording an employer a reliable means by which to determine whether a union claiming to represent his employees actually is the choice of a

[38] In the absence of any Wagner Act guidance as to how and by whom election petitions could be filed (see n. 35, *supra*), the Board had developed the rule that an employer could petition for an election only when presented with conflicting recognitional demands by two or more unions. It was thought that, if an employer were given the same broad right to petition as was afforded a union, he could stifle an organizational campaign by demanding an election before the union had attained majority status. The 1947 amendments resolved this problem by allowing the employer to petition only after a recognitional demand had been made. See H. Rep. No. 245, 80th Cong., 1st Sess. 35, 1 Leg. Hist. (1947) 326; S. Rep. No. 105, 80th Cong., 1st Sess. 10–11, 1 Leg. Hist. (1947) 416–417.

majority." There is no suggestion that Congress intended thereby to relieve the employer of his bargaining obligation under Section 8(a)(5) where he had no good faith doubt of the union's majority status and had, indeed, engaged in unfair labor practices which disrupted the Board's election machinery. And, as has already been shown, the Board's administration of Section 8(a)(5) is fully in accord with the policy reflected in this section. In most cases an employer is able to insist upon a secret ballot test of the union's majority status; his refusal to recognize the union before the election will not be found to have violated Section 8(a)(5) unless he engaged in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede the election.

In sum, the 1947 amendments to the Act did not limit the duty to bargain imposed by Section 8(a)(5) to unions whose majority status is determined in a

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[9] Thus, the Senate report declared that "present Board rules * * * discriminate against employers who have reasonable grounds for believing that labor organizations claiming to represent the employees are really not the choice of the majority." S. Rep. No. 105, 80th Cong., 1st Sess. 10-11, 1 Leg. Hist. (1947) 416-417. The remarks of Senator Taft during the debate are even more illuminating:

> Today an employer is faced with this situation. A man comes into his office and says, "I represent your employees. Sign this agreement or we strike tomorrow." * * * The employer has no way in which to determine whether this man really does represent his employees or not. The bill gives him the right to go to the Board and say, "I want to know who is the bargaining agent for my employees." [93 Cong. Rec. 3954, 2 Leg. Hist. (1947) 1013.]

See also the remarks of Senator Ball, 93 Cong. Rec. 5146, 2 Leg. Hist. (1947) 1496.

Board election. "Cards have been used under the Act for thirty years; the Supreme Court has repeatedly held that certification is not the only route to representative status; and the 1947 attempt in the House-passed Hartley bill to amend section 8(a)(5) * * * was rejected by the conference committee that produced the Taft-Hartley Act. No amount of drum-beating should be permitted to overcome, without legislation, this history." Lesnick, *Establishment of Bargaining Rights Without an Election*, 65 Mich. L. Rev. 857, 861–862 (1967). The Fourth Circuit's contrary view—specifically rejected by the six courts of appeal which subsequently have considered the issue[40]—is plainly incorrect.[41]

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[40] *National Labor Relations Board* v. *Sinclair Co.*, 397 F. 2d 157, 161–162 (C.A. 1), certiorari granted, December 16, 1968, No. 585, this Term; *National Labor Relations Board* v. *United Mineral and Chemical Corp.*, 391 F. 2d 829, n. 10 (C.A. 2); *National Labor Relations Board* v. *Goodyear Tire and Rubber Co.*, 394 F. 2d 711, 712 (C.A. 5); *National Labor Relations Board* v. *Southland Paint Co.*, 394 F. 2d 717, 724 (C.A. 5); *I.T.T. Semi-Conductors, Inc.* v. *National Labor Relations Board*, 395 F. 2d 257, 259 (C.A. 5); *National Labor Relations Board* v. *Atco Surgical-Supports*, 394 F. 2d 659, 660 (C.A. 6); *National Labor Relations Board* v. *Montgomery Ward*, 399 F. 2d 409, 412–413 (C.A. 7); *National Labor Relations Board* v. *Ozark Motor Lines*, 69 LRRM 2706 (C.A. 8).

[41] When Congress further amended the Act in 1959, it again refrained from qualifying the language of Section 8(a)(5) or otherwise limiting the bargaining obligation. Indeed, aware that the bargaining obligation under the Act was not dependent on a Board certification, Congress accorded protection against recognitional and organizational picketing not only to incumbent certified unions (cf. Section 8(b)(4)(C)), but whenever "the employer has lawfully recognized in accordance with this

## II. Where the Board Has Found a Refusal to Bargain in Violation of Section 8(a)(5), It May Appropriately Enter a Bargaining Order Even Though Subsequently the Union May Have Lost Its Majority Status

Upon finding that an employer refused to bargain in violation of Section 8(a)(5) of the Act, the Board is not limited to a cease-and-desist remedy; it may properly order the employer to bargain with the union

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Act any other labor organization and a question concerning representation may not appropriately by raised under Section 9(c) of this Act" (Section 8(b)(7)(A)). See S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess., Minority Views, 77–78, I Leg. Hist. (1959) 473–474.

Since 1959, several bills have been introduced in Congress to amend the Act so as to eliminate or curtail the Board's authority to impose a bargaining obligation based on authorization cards, but none of these bills has been reported out of committee. Thus, in 1965 Senator Javits proposed a bill which would have amended Section 9(c) to provide for the holding of an expedited election upon the petition of an employer alleging that a union had demanded recognition based on cards. If the employer petitioned for an expedited election, the Board would be barred from finding a refusal to bargain prior to the election, except where the employer's unfair labor practices had (1) dissipated the union's previously valid majority status, or (2) eliminated the possibility of a fair election. As a corollary to this amendment, the Javits bill added a new Section 8(g), providing that an employer's refusal to bargain would violate Section 8(a)(5) only where the employer (1) was presented with evidence of the union's majority support, (2) had no good faith doubt of the union's majority, and (3) failed to file for an expedited election. S. 2393, 89th Cong., 1st Sess. (1965). The bill was reintroduced, without substantial change, the following year. S. 3452, 89th Cong., 2d Sess. (1966). See also S. 22, 90th Cong., 2d Sess. (1967); S. 426, 91st Cong., 1st Sess. (1969); Hearings Before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, on S. 256, 89th Cong., 1st Sess. 19–26.

without first requiring the union to show that it still represents a majority of the employees. *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U.S. 512; *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702; *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 748, n. 16; *National Labor Relations Board* v. *International Union, Progressive Mine Workers of America*, 375 U.S. 396. The appropriateness of the bargaining order remedy in such a case was fully set forth in *Franks Bros.*, on facts similar to those in the present cases.

In *Franks Bros.*, the union had demanded recognition on the basis of authorization cards obtained from a majority of the employees, the company rejected the demand, and the union filed an election petition. However, before the election could be held, the company engaged in a coercive anti-union campaign, including threats to close the plant if the union won the election. This prompted the union to withdraw its petition and file unfair labor practice charges. 321 U.S. at 702–703. The Board found that the company had refused to bargain in violation of Section 8(5), as well as committing other unfair labor practices. It issued a bargaining order as "the only means by which a refusal to bargain can be remedied," despite the fact that, in the interim between the filing of the charges and the issuance of a complaint, the union had lost its majority status. *Id.* at 703.

This Court sustained the bargaining order. The Court noted that "the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen repre-

sentatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." 321 U.S. at 704. It concluded that, for these reasons, it "seems too plain for anything but statement" that it was proper for the Board to adopt a form of remedy which

> requires that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority. The Board might well think that, were is not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. In the Board's view, procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law. * * *[*Id.* at 705.]

Nor, in the Court's view, did the bargaining order "involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement." For, although "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to

succeed," after "such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." 321 U.S. at 705–706.

Where there has been a refusal to bargain accompanied by serious unfair labor practices against a union which has obtained authorization cards from a majority of employees, it is likely that its majority status will be dissipated as a result of the unfair labor practices and the time required for the Board to issue its decision and remedial order.[42] Merely to issue a cease-and-desist order and to direct an election in this situation would both prejudice the employees' right freely to determine whether they desire a representative and profit the wrongdoing employer. The new test of the union's majority would most probably reflect an unlawfully altered picture of employee sentiment.[43]

[42] The Board's records show that, in the period January to June 1968, the median time between filing of an unfair labor practice charge and Board decision in a contested case was 388 days.

[43] The study referred to in *National Labor Relations Board* v. *Sehon Stevenson & Co.*, 386 F. 2d 551, 556 (C.A. 4) (Sobeloff, J., concurring), shows that, "in over two-thirds of the cases, the party who destroyed the election process in the first instance wins in the re-run." See also *Bernel Foam Products Co.*, 146 NLRB 1277, 1281.

The Fourth Circuit is mistaken in suggesting (*National Labor Relations Board* v. *Logan Packing Co.*, *supra*, 386 F. 2d at 570) that, "in the great majority of cases, a cease and desist order with the posting of appropriate notices will eliminate any undue influences upon employees voting in the security of anonymity." Moreover, the Board rather than the reviewing court is the appropriate agency to determine whether unfair labor practices preclude a fair election and require a bargain-

This would be precisely the result which the recalcitrant employer hoped to achieve by his refusal to bargain and his course of unlawful conduct. Further, such a limitation on remedy would encourage the employer to meet the new election with renewed coercion, aggravating the unlawful situation already existing. In any particular case, an effective remedy may require an order restoring the parties to the positions they occupied when the refusal to bargain took place by directing the employer to bargain with the union on the basis of its original showing of majority status."

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ing order; the court must accept the Board's judgment unless it is unreasonable. See *Franks Bros.*, *supra*, 321 U.S. at 704 *United Steelworkers* v. *National Labor Relations Board*, 376 F. 2d 770, 773 (C.A. D.C.), certiorari denied, 389 U.S. 932. As we show *infra*, the unfair labor practices here were of such a nature that the Board could reasonably conclude that they tended to destroy the union's majority and preclude a fair election.

" "When the preferred method of determining employee wishes has been tampered with, it totally begs the question to say that employee rights are sacrificed by a bargaining order. Employee rights are affected whatever the result: If an inadequate rerun remedy is routinely applied, the rights of those employees who desire collective bargaining, and whose desires were met with violations of the law, are not being protected; if a bargaining order is issued, the rights of those who oppose collective bargaining are being tramped on if * * * a poll conducted after the effects of the earlier coercion were satisfactorily dissipated would indicate a union loss. Thus it is impossible to defend a refusal to impose a bargaining order unless one is willing to defend the adequacy of the particular remedies in fact applied in connection with the decision to direct a second election * * *." Lesnick, *op. cit.*, *supra*, 65 Mich. L.Rev. at 862.

See, *e.g.*, *National Labor Relations Board* v. *Ralph Printing and Lithographing Co.*, 379 F. 2d 687, 693 (C.A. 8); *National Labor Relations Board* v. *Luisi Truck Lines*, 384 F. 2d 842, 847–848 (C.A. 9, 1967); *National Labor Relations Board* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 183 (C.A. 2), certiorari denied, 370 U.S. 919.[45]

[45] It has been argued that, even absent a showing that a union seeking recognition had acquired majority status, a bargaining order would be an appropriate remedy for unfair labor practices so coercive that they made a fair election impossible. Bok, *op. cit. supra* n. 30, 78 Harv. L. Rev. at 138; cf. *National Labor Relations Board* v. *Flomatic Corp.*, 347 F. 2d 74, 78–79 (C.A. 2). The Fourth Circuit has left the door open to applying the bargaining order remedy in such "extraordinary cases," "without need of answering the question whether the union ever obtained majority status." R II 554–555; *National Labor Relations Board* v. *Logan Packing Co.*, 386 F. 2d 562, 570–571. But it would appear within the *Board's* discretion to decide that the remedy was appropriate on a less dramatic showing of unfair labor practice if there were also a showing that majority status had been obtained. As already shown, it is not every unfair labor practice which leads the Board to conclude that a union refused recognition despite majority status as shown by authorization cards is entitled to the bargaining order remedy; on the other hand, bargaining orders have been entered and enforced in cases of substantial unfair labor practices against a majority union, even absent a refusal to bargain finding. See, *e.g.*, *Editorial "El Imparcial," Inc.* v. *National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1); *J. C. Penney Co., Inc.* v. *National Labor Relations Board*, 384 F. 2d 479, 485–486 (C.A. 10); *Summit Mining Corp.* v. *National Labor Relations Board*, 260 F. 2d 894, 900 (C.A. 3).

## III. The Board Correctly Concluded That the Employers Here Violated Section 8(a)(5) of the Act by Refusing to Bargain With the Representatives of a Majority of Their Employees; the Bargaining Orders Issued by the Board as a Remedy for These Violations Were Necessary and Proper to Effectuate the Policies of the Act

Applying the principles discussed in Points I and II, we now show that the Board correctly concluded that the employers have violated Section 8(a)(5) of the Act by refusing to bargain with the unions involved, and that a bargaining order was an appropriate remedy for those unfair labor practices.

### A. Gissel

At the outset of the Union campaign, Company Vice-President Gissel informed employees Frye and Mount that if they were caught talking to union men "you God-damned things will go" (RI 265; 61). Subsequently, the Union presented oral and written demands for recognition, claiming to have obtained authorization cards from 31 of the 47 employees in the appropriate unit. The Company rejected the bargaining demand and promptly embarked upon a course of coercive conduct which, the Fourth Circuit agreed, violated Sections 8(a)(1) and (3) of the Act. Company officials, including Vice-President Gissel, interrogated employees as to their union involvement and as to the union activities of other specifically named employees (RI 265–270; 93–96, 60–61, 102–104); employees were alternately promised better benefits than

the Union could offer, and warned that, "if the union got in, [Gissel] would just take his money and let the union run the place" (RI 270; 141), that the Union was not going to "get in," that it would have to "fight" Gissel first (*ibid.*). Further, when the Company learned that a union meeting was to be held, it arranged to have an agent present to report the identity of the union adherents. The first work day following the meeting, Vice-President Gissel told Frye and Mount he knew they had gone to the meeting and added that their work hours were henceforth reduced to half a day. Three days later, the two employees were discharged; when they protested, Vice-President Gissel told them in vulgar term, "what they could do with the union" (RI 276; 67).

The total impact of this course of conduct is unmistakable. The Company surrounded the union campaign with an atmosphere of hostility, sought out the identity of the union adherents, and then punished them with discharge. Inevitably, this tended to chill the interest in organization which existed in the plant. It was not the conduct of an employer who seeks in good faith to resolve doubts regarding a union's majority—either regarding the number of cards it has actually obtained or the circumstances in which it did so. Moreover, the reasons which the Company advanced to justify its refusal to bargain do not withstand analysis. First, the Company claimed that it had been advised of improprieties in the Union's organization techniques, including instances of direct misrepresentation. Yet no evidence was introduced to

support this accusation at the Board hearing (RI 264, 288).[46] Second, the Company asserted that it did not understand the unit sought by the Union and that truckdrivers (expressly included in the demand) should not be part of any appropriate unit. The Board expressly found (RI 287, n. 39), however, that Company Vice-President Gissel fully understood that the Union was requesting bargaining rights in the same unit as had been established by the Board for the 1961 election—a unit which had included the truckdrivers.[47] Finally, the Company declared its belief that the Union's defeat in that election, four years before, cast doubt on the Union's current claim of employee support. But as the Fourth Circuit itself had recognized, "A union's [prior] unsuccessful attempts at organization * * * may not be relied upon by an employer to refuse * * * to recognize the union or at least to undertake some inquiry into the actual ex-

[46] The Company's only objection to the 31 cards involved a claim that the Trial Examiner erred by allowing into evidence certain cards that were not identified by the purported signer. However, the law is clear that authorization cards may be properly authenticated by alternative means, including comparison of signatures, testimony of witnessing employees, and, as here, testimony by the solicitor. *Colson Corp.* v. *National Labor Relations Board*, 347 F. 2d 128, 134 (C.A. 8), certiorari denied, 382 U.S. 904; *National Labor Relations Board* v. *Luisi Truck Lines*, 384 F. 2d 842, 846, n. 3 (C.A. 9); *National Labor Relations Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 85–86 (C.A. 9), affirmed, 346 U.S. 482.

[47] The sole ambiguity in the Union's demand was whether its claim to represent the "truckdrivers" referred to a few production employees who occasionally drove trucks, or to the truckdriver salesmen. At the hearing, Vice-President Gissel conceded that he understood the Union's reference to truckdrivers to mean driver-salesmen (RI 287, n. 39; 215–217).

tent of the union's representation." *National Labor Relations Board* v. *Overnite Transportation Co.*, 308 F. 2d 279, 283 (C.A. 4).

A bargaining order was an appropriate remedy for these unfair labor practices. Unfair labor practices of the kind engaged in by the Company would tend to undermine the clear majority which the Union had originally attained, and warranted the inference that the Company's refusal to bargain was improperly motivated. In these circumstances, a Board election would not reflect a true picture of employee sentiment.[48] A remedy which merely imposed a cease-and-desist requirement, leaving the parties to agree or to petition for an election, would reward the Company with the fruits of its illegal conduct. Thus, the Board properly concluded that the *status quo ante* could be most nearly restored, and the policy of the statute best effectuated, by requiring the Company to bargain with the Union which, at the time of its refusal to bargain, had been the majority representative of its employees.

### B. HECK'S

#### 1. THE CHARLESTON WAREHOUSES

After an organizing drive initiated by the employees themselves, the Union first demanded recognition on the basis of thirteen authorization cards from the twenty-six employees of the Company's three Charleston warehouses. Company President Haddad immedi-

[48] Thus, the Union wrote the Company that "the coercion and intimidation and illegal interrogation and threats which occur between the time an election is petitioned and the actual election * * * is most difficult for us to combat" (RI 258).

ately assembled the employees and told them of his shock at their selection of the Union; he singled out one of the employees to ask if he had signed a union card (RII 428; 339). The next day, the Union obtained the additional card necessary to establish a majority. The same day, the leading union adherent (the employee who had established the initial contacts with the Union and solicited a large percentage of the cards) was discharged (RII 431–433), and another employee was interrogated as to his union involvement, encouraged to withdraw his authorization, and warned that a union victory could result in reduced hours, fewer raises, and withdrawal of bonuses (RII 429–430; 365–366). The second demand for recognition was made two days later, and in the ensuing two weeks, President Haddad summoned two known union adherents to his office and offered them new jobs at higher pay in return for their promise to use their influence "to break up the union." One of the employees accepted the offer. (RII 430; 347–348, 351.)

The Company never actually expressed doubt of the Union's majority, replying simply "no comment" to all demands for recognition; as in *Gissel*, however, it embarked on a coercive anti-union campaign immediately following the initial bargaining demand. On the basis of this coercive conduct, which again the court of appeals agreed violated Sections 8(a) (1) and (3), the Board reasonably inferred that the real reason for the refusal to bargain was, not doubt of the Union's majority status, but rather a desire to destroy the Union by illegal means and thereby avoid a bar-

gaining obligation altogether.[49] Thus, as in *Gissel*, a bargaining order was the only adequate remedy. Indeed, the necessity for such an order is readily apparent here, for the Company's coercive conduct (the discharge of one union adherent and the bribing of another) did in fact dissipate the Union's one card majority.

2. THE ASHLAND STORE

The Company's reaction to the Union's organization effort at its Ashland store was much the same as at Charleston. Early in the campaign, President Haddad addressed the assembled employees, and warned them that one of the employees at another Company store had been "fired on the spot" after admitting that she signed a union card (RII 526–527; 483, 499). Immediately following the demand for rec-

[49] In the proceeding below, the Company argued that it had been misled into believing that the Union was claiming to represent a majority of all the Company employees. This argument is negated by the Union agent's credited testimony that he had repeatedly requested recognition in a unit limited to the warehousemen and truckers in the three Charleston area stores (RII 427–428, 453; 329–332). The Company further argued that the Union varied its demand by suggesting that it would be willing to bargain for a separate contract at each warehouse. But, as the Board found, this was "no variance, but rather an alternative" (RII 453), which in no way implied abandonment of the original demand for a three warehouse unit. And, the Company urged that the Union's recognition demand was deficient because certain employees designated as "pricers," expressly included in the unit by the Board, were not specifically mentioned by the Union. However, since the unit status of the "pricers" was never an issue until the Board hearing began, it is clear that their placement played no part in the Company's negative response to the Union's demand.

ognition, the Company's operations manager polled the employees in regard to their desire for representation, but did not observe the safeguards which would have prevented the poll from becoming an instrument of intimidation and coercion (RII 528–532; 483, 490, 492). Such coercive conduct fully warranted the Board's conclusion that the Company's refusal to bargain was not prompted by any concern over the Union's majority status, but by a desire illegally to evade any bargaining obligation. Indeed, the assistant store manager told one of the employees that the Company knew that the Union had attained majority status and, further, that it knew which employees had signed cards (RII 532–533; 473–474).[50]

The Company's letter of October 13, setting forth its "good faith" reasons for refusing to bargain (RII 525; 513), serves only to strengthen the evidence of bad faith. The Company asserted that the demand for recognition was improper and confusing in that the Union had offered to bargain in a unit either with

[50] The Company made no attempt to dispute this evidence. The assistant store manager was not called as a witness and no higher Company officials appeared to deny knowledge of the Union's majority status (RII 542, n. 37).

By the date of its recognition demand, the Union had obtained cards from 21 of the 38 employees in the appropriate unit. The Company produced no evidence of misrepresentation or coercion in the solicitations. However, it did challenge 13 cards on the ground that, in the absence of identification by the purported signer, they were not properly authenticated. There is no merit to this contention (see n. 46, *supra*). Moreover, the Company contended that one card was procured through the influence of a supervisory employee. But the facts found by the Board show that the supervisor's statements, albeit favorable to the Union, were not actually instrumental in obtaining the card (RII 536).

or without department heads. However, the demand was wholly unambiguous; as the Board found, the Union had simply offered to leave the placement of department heads up to the Company, claiming representative status whichever way the Company decided the issue (RII 538–539). The Company further relied upon the results of its informal poll, pointing out that the Union had lost by an "overwhelming" margin. But a coercive poll, such as this was, is a transparent device, whose distorted results could not provide the basis for a good faith doubt. See *Madison Brass Works, Inc.* v. *National Labor Relations Board,* 381 F. 2d 854, 858 (C.A. 7).

Finally, in its brief to the Trial Examiner, the Company for the first time sought to justify its refusal to recognize the Union on the ground that it had received a letter from the Retail Clerks Union shortly before the Union's demand for recognition, asserting a continuing interest in the Company's employees and suggesting that any agreement with other labor organizations would lead to legal action.[51] While an employer confronted with rival unions' conflicting representation claims, need not and in fact may not recognize either one, there was no such conflict here. The Retail Clerks neither demanded recognition nor

[51] The Retail Clerks had commenced an organizing campaign at the Ashland store in early 1964. However, by the end of that year, the Company's coercive and discriminatory conduct had brought the campaign to an unsuccessful close. *Heck's, Inc.*, 150 NLRB 1565, enforced, 369 F. 2d 370 (C.A. 6). At the hearing in this case, employees testified, without contradiction, that no representative of the Retail Clerks had appeared at the store since late 1964 (RII 543; 498).

made any claims stronger than a vague assertion of "interest". Since the Company admittedly never replied to or sought clarification of this "rival claim," its professed concern was plainly an afterthought. It was not mentioned in the Company's October 13 letter which purported to detail its reasons for refusing to bargain, nor did the Company question its employees in regard to the Retail Clerks during its October 9 poll. The Board properly concluded (RII 543–545) that the Company's refusal to bargain was not in any degree motivated by the "interest" of the Retail Clerks.

C. GENERAL STEEL

Throughout the Union's six-month organizational campaign—both before and after its demand for recognition—the Company's foremen and supervisors engaged in extensive acts of coercion and intimidation. As detailed in the Statement (*supra*, pp. 8–10), the Company interrogated employees about their union involvement; threatened them with discharge for engaging in union activities or voting for the Union; suggested that unionization might hurt business and make new jobs more difficult to obtain; warned that strikes and other dire economic consequences would result if the Union were to come in; and asserted that, although it would have to negotiate with the Union, it could negotiate endlessly and would not have to sign anything. The Board found, and the court of appeals agreed, that this conduct restrained and coerced the Company's employees, in violation of Section 8(a)(1) of the Act. Moreover, in the light of these unfair labor practices, the Board could reasonably conclude that

the Company refused to bargain, not because it in good faith doubted the Union's majority, but because it was determined not to bargain with the Union under any circumstances and desired to gain time to undermine it by unlawful means.[52]

The Union did not waive its right to file the refusal-to-bargain charge by permitting the election it had requested to proceed despite the employer's unfair practices. Under a policy the Board readopted in *Bernel Foam Products Co.*, 146 NLRB 1277,[53] a union may test its representative status in a Board

[52] As in other cases, the Company's explanation of the reasons for its purported doubt is unconvincing. Although the Union did promise the employees in a letter of August 13 that their identities would be kept secret, it demanded recognition the next day, before the letter would have been received and acted upon. Thus any effect the letter might have had in misleading employees as to the purpose of the cards is irrelevant. And, if the Company's informal poll showed that only 30 percent of the employees favored the Union, it is nonetheless evident that, as in *Heck's*, that poll was infected by the Company's extensive unfair labor practice campaign (R III 589-591).

[53] The policy was first announced in *M.H. Davidson Co.*, 94 NLRB 142, and thereafter received consistent judicial approval. *E.g.*, *National Labor Relations Board* v. *Model Mill Co.*, 210 F. 2d 829 (C.A. 6); *National Labor Relations Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (C.A. 9), affirmed, 346 U.S. 482. The Board departed from this view in *Aiello Dairy Farms*, 110 NLRB 1365, holding there that by proceeding to election the union had waived its right to consideration of its refusal to bargain charge. Ten years later, discouraged by its experience under *Aiello*, the Board returned to its earlier position in *Bernel Foam*. The *Bernel Foam* policy has been consistently approved since its readoption. *E.g.*, *Irving Air Chute Co.* v. *National Labor Relations Board*, 350 F. 2d 176, 182 (C.A. 2); *National Labor Relations Board* v. *Frank C. Varney Co.*, 359 F. 2d 774 (C.A. 3).

election without automatically waiving its right to charge thereafter that the election was invalid and that, prior to the election, the employer had unlawfully refused to bargain.

There is no fatal inconsistency in this approach. Although its filing of a representation petition implies recognition that a *question* of representation exists, the union never fully abandons its position (stated expressly in its prior demand for recognition) that it represents the employees and is entitled to bargaining rights. Filing of the petition simply acknowledges that the employer does not agree that the union is so entitled, as shown by his refusal to bargain; the union seeks an election as an expedient means of proving its status. As the Board explained in *Bernel Foam* (146 N.L.R.B. at 1280):

> Although an election is a relatively swift and inexpensive way for the union to put the force of law behind its majority status, the procedure is highly uncertain entailing the real possibility that because of conduct by the employer no fair election will be held * * *. On the other hand, although in pursuing an 8(a)(5) charge a union does not risk the effect upon its majority of later unlawful conduct on the part of the employer, such a proceeding is considerably more complicated, consumes more time during which employees are denied the representation they desire, and involves greater expense. Since this difficult and rather dubious "choice" is created by the employer's unlawful conduct, there is no warrant for imposing upon the union which represents the employees an irrevocable option as to the method it will pur-

> sue in seeking vindication of the employees' representation rights while permitting the offending party to enjoy at the expense of public policy the fruits of such unlawful conduct. * * *

It appears that the Company may also contend (Brief in Opp. pp. 6–9) that some or all of the authorization cards could not be counted in determining the Union's representative status because of misrepresentations regarding the purpose for which they would be used. It is the only respondent in these cases which challenged the validity of authorization cards on this ground before the Board. On the record, however, the Board concluded that, with a few exceptions not sufficient to deprive the Union of a majority, the alleged misrepresentations[54] did not vitiate the sign-

[54] Six employees, by affirmative responses to leading questions, testified that they were told that the only purpose of the card was an election. However, after examining the whole record, including the conflicting testimony of the solicitors, the Trial Examiner concluded that no invalidating misrepresentation had actually been made (RIII 584–588). There is no occasion to disturb his credibility determinations. See *National Labor Relations Board* v. *Cumberland Shoe Corp.*, 351 F. 2d 917, 919 (C.A. 6). Nor was the union solicitors' assurance to the employees that their cards would be kept "secret" or "confidential" tantamount to a representation that recognition would not be sought on the basis of cards or that their sole purpose was to obtain an election. A union may make a valid card-bargaining demand without tendering cards to the employer or requesting a card check. *National Labor Relations Board* v. *Security Plating Co.*, 356 F. 2d 725, 726–727 (C.A. 9); *National Labor Relations Board* v. *Trimfit of California, Inc.*, 211 F. 2d 206, 210 (C.A. 9). Further, even when a card check is made, the judge or umpire is generally a neutral third party who would not necessarily communicate the identity of the signers to the employer. Finally, the Company is hardly in a position to com-

er's unqualified designation of the Union as bargaining representative. In reaching this conclusion, it applied its standard, recently explained at length in *Levi Strauss & Co.*, 172 NLRB No. 57, 68 LRRM 1338, that where, as here, a card is unambiguous and unequivocal in designating the union as representative for all collective bargaining purposes (including demands for recognition), misrepresentation will be found only if employees are told, in any form of words,[55] that the card's only purpose is to qualify for a Board election. See also *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced, 351 F. 2d 917 (C.A. 6).

Although the Fourth Circuit has rejected this rule, sometimes known as the *Cumberland Shoe* doctrine, this Court has declined to review the issue.[56] The court

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plain of the Union's assurances of secrecy when its own highly coercive conduct made such assurances essential. See *National Labor Relations Board* v. *Consolidated Rendering Co.*, 386 F. 2d 699, 702 (C.A. 2); *National Labor Relations Board* v. *Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851, 856 (C.A. 1).

[55] Several courts have criticized the Board's treatment of solicitation misrepresentations as tending to rely upon the presence or absence of "magic words." *E.g.*, *National Labor Relations Board* v. *S. E. Nichols Co.*, 380 F. 2d 438, 442–445 (C.A. 2); *National Labor Relations Board* v. *Swan Super Cleaners, Inc.*, 384 F. 2d 609, 617–618 (C.A. 6); *National Labor Relations Board* v. *Dan Howard Mfg. Co.*, 390 F. 2d 304, 308–309 (C.A. 7). If there ever was any basis for this criticism, the restatement in *Levi Strauss & Co.*, *supra*, removes it.

[56] The issue was raised in three cases in which petitions for certiorari were denied last Term. *National Labor Relations Board* v. *Crawford Mfg. Co.*, No. 1050, 390 U.S. 1028; *Preston Products Co.* v. *National Labor Relations Board*, No. 1367, 392 U.S. 906; *Bryant Chucking Grinder Co.* v. *National Labor Relations Board*, No. 1324, 392 U.S. 908. See also *Atlas Engine*

of appeals in this case did not pass upon the validity of the cards. Since that issue turns largely upon the facts surrounding the solicitations, this Court's normal practice would be to remand the case to that court if it agrees with us on the other issues. In addition to *Levi Strauss & Co., supra,* however, the reasons why we believe that the *Cumberland Shoe* doctrine is an appropriate gloss upon the statutory requirement of bargaining are set forth in considerable detail in our petition for certiorari last Term in *Crawford Manufacturing,* n. 56, *supra.* The kind of inquiry which the court of appeals called for in that case would lead to an endless and inherently unreliable examination of the beliefs and motivations of each employee who signed the cards.[57] Thus, should this Court deem it appropriate itself to dispose of the point in order to terminate this litigation, the rationale of the Board's rule is readily available and, we believe, thoroughly sound.

Finally, as the Board further found (RIII 591), in this case the bargaining order would have been appropriate as a remedy for the Company's ex-

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*Works* v. *National Labor Relations Board*, No. 598, this Term (Memorandum for the Respondent, pp. 3–4); *Thrift Drug Co.* v. *National Labor Relations Board*, No. 906, this Term (Memorandum for the Respondent, p. 3).

[57] *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 742–743 (C.A. D.C.), certiorari denied, 341 U.S. 914; *International Union United A. A. & A. Imp. Wkrs.* v. *National Labor Relations Board*, 392 F. 2d 801, 807 (C.A. D.C.), certiorari denied, *sub nom. Preston Products Co.* v. *National Labor Relations Board*, 392 U.S. 906; *National Labor Relations Board* v. *Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851, 855 (C.A. 1).

tensive violations of Section 8(a)(1), without regard to its refusal to bargain.[58]

## CONCLUSION

The judgments of the court of appeals should be reversed insofar as they deny enforcement of the Board's bargaining orders, and the cases should be remanded to that court with directions to enforce those orders.

Respectfully submitted.

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FEBRUARY 1969.

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[58] The court below concluded (RIII 894, n. 3) that the Section 8(a)(1) violations were not so pervasive as to preclude a fair election. For the reasons given in n. 43, *supra*, the court's conclusion rests on an erroneous standard and does not accord proper deference to the Board's judgment respecting the feasibility of holding a fair election.

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

SEC. 8(a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for

the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that there employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

SEC. 10. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

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U.S. GOVERNMENT PRINTING OFFICE: 1959

# INDEX

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*CASES:*